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Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. When a court of appeals concedes that an agency's reasons for rescinding prospective passive restraint regulations would have justified not adopting such regulations in the first instance, may the court reject these same reasons as arbitrary and capricious when used to support the agency's decision to rescind those regulations?

2. When an agency finds that changed circumstances create "substantial uncertainty" whether a previously issued regulation will achieve its purpose, may the court declare the agency's decision to rescind that prospective regulation arbitrary and capricious solely because the agency was unable to find that the regulation would *not* achieve its purpose?

3. May the court of appeals, when reviewing the exercise of an agency's broad statutory discretion, invalidate as arbitrary and capricious the agency's decision to rescind a prospective passive restraint regulation because the court divines a legislative "mandate" from congressional refusal either to require or prohibit passive restraints and its failure to veto the prospective regulation?

4. May a court of appeals invalidate an agency's rescission of its own prospective regulation as arbitrary and capricious on the ground that the agency should have considered regulatory alternatives that were neither raised by the agency's notice of proposed rulemaking nor foreclosed by the agency's rescission order under review?

5. Is it an unlawful invasion of the primary jurisdiction of an administrative agency for a court of appeals, after remanding an agency's rescission of its own regulation for further agency consideration, to reverse its own order and reinstate the regulation by a date certain, regardless of whether the further agency proceedings have been completed, and regardless of how the agency might resolve the issues remanded?

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Drew Lewis, the National Highway Traffic Safety Administration, and Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

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OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, *State Farm Mutual Automobile Insurance Co. v. DOT*, 680 F.2d

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[1] A list of parent companies, subsidiaries, and affiliates of the foregoing petitioners is set forth in the Appendices to Petition for Writ of Certiorari in No. 82-354 ("App.") at App. 172a-176a.

206 (D.C. Cir.), are reproduced at App. 1a. The court's subsequent unpublished Order and Memorandum of August 4, 1982, are reproduced at App. 79a. The rescission order of the National Highway Traffic Safety Administration ("NHTSA"), 46 Fed. Reg. 53419 (1981), is reproduced at App. 88a.

JURISDICTION

The judgment below was entered on June 1, 1982. App. 161a. Petitions for writs of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. Jurisdiction to review the court's judgment and its subsequent order is vested in this Court by 28 U.S.C. § 1254(1), as further provided in 15 U.S.C. § 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act" or "Act"), 15 U.S.C. §§ 1381 *et seq.*,[2] are reproduced at App. 162a, 163a.

STATEMENT OF THE CASE

The Safety Act authorizes the Secretary of Transportation to issue federal motor vehicle safety standards. It leaves the subject matter and content of each standard to the Secretary's discretion, subject to very narrow exceptions and within certain criteria laid down in the Act. The Secretary has delegated the exercise of this discretion to NHTSA in the first instance. 49 C.F.R. § 501.2(a)(1981).

Since 1968, Federal Motor Vehicle Safety Standard 208 ("Standard 208") has continuously required that new passenger cars have safety belts. 32 Fed. Reg. 2408, 2415

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[2] Act of September 9, 1966, Pub. L. No. 89-563, 80 Stat. 718, as amended.

(1967). *See* 49 C.F.R. § 571.208 (1981); App. 120a.[3] These belt systems are referred to as "active" belts, because occupants must "buckle up" for the belts to serve their function. In 1977, NHTSA amended Standard 208 to require "passive" rather than "active" occupant restraints beginning in September 1981 for large cars, September 1982 for mid-sized cars, and September 1983 for small cars.[4] The 1981 date was later extended by one year. In October 1981, following notice, comments and hearing, NHTSA rescinded those "passive" restraint provisions, 10 months before the effective date for large and mid-sized cars and 22 months before the effective date for small cars.

On June 1, 1982, the court of appeals invalidated NHTSA's rescission order as "arbitrary and capricious" under 5 U.S.C. § 706(2)(A). On August 4, the court ruled *sua sponte* that the rescinded requirements would go into effect on September 1, 1983, subject to further consideration by the court after receiving a report it requested from NHTSA as to whether this effective date

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[3] Standard 208 is one of approximately eighteen NHTSA standards designed to help protect occupants should an accident occur. Still others are designed to help prevent accidents in the first instance. *See generally* 49 C.F.R. pt. 571 (1981).

[4] "Passive" restraints—sometimes referred to as "automatic" restraints—are those that NHTSA describes as affording protection in frontal crashes "by means that require no action by vehicle occupants." *See id.* § 571.208 (S4.1.3(a)).

The two principal passive restraint technologies developed to date are airbags and passive belts. In a frontal impact, an airbag fills with gas as it deploys from the instrument panel or steering wheel/column assembly and restrains the forward-moving occupant. A "passive" or "automatic" belt restrains an occupant much as an "active" belt does when it is buckled up. In the design principally used, the passive belt has one end anchored near an edge of the door and incorporates a push-button release mechanism; so long as the belt is not detached from that anchorage, the belt will move away from and redeploy in front of the occupant as the door is opened and closed. This type of passive belt is generally referred to as detachable.

was "achievable." [5] App. 80a. NHTSA's report, filed on October 1, concludes that this date is not "achievable." MVMA Br. App. 39.[6] That report has not been acted on. On November 18 the court of appeals noted the issuance of writs of certiorari by this Court and recalled its mandate. J.A. 16.

A. The Statutory Scheme

The Safety Act authorizes NHTSA, as the Secretary's delegate, to issue "appropriate" federal motor vehicle safety standards. 15 U.S.C. § 1392(a). It requires that each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *Id.*[7] It also requires the agency to consider "whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed," as well as "the extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.* § 1392(f). The Act also specifically grants to the agency authority to "amend or revoke" safety standards. *Id.* § 1392(e).

In the Motor Vehicle and Schoolbus Safety Amendments of 1974,[8] Congress established two limitations on

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[5] The court extended the effective date of the requirement for large and mid-sized cars by one year, to September 1983. App. 80a. For all other cars, the court reimposed the September 1983 effective date contained in the rescinded rule.

[6] Petitioners have filed with this brief an appendix reprinting portions of the agency's October 1 report, respondent State Farm's responses thereto, and NHTSA's reply to those responses. References to that appendix are cited as "MVMA Br. App. ——."

[7] The Safety Act further defines the term "motor vehicle safety" to mean "performance . . . in such a manner that the public is protected against *unreasonable* risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable* risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1) (emphasis supplied).

[8] Act of October 27, 1974, Pub. L. No. 93-492, 88 Stat. 1470.

the agency's authority to issue an occupant restraint standard. One of these amendments, a response to "swift and furious" public reaction (App. 33a) against NHTSA's requirement that active belts include ignition interlocks and continuous warning buzzers, prohibited any standard requiring or permitting such devices as a means of compliance. 15 U.S.C. §§ 1410b(a)-(b). Congress also prohibited NHTSA from adopting any occupant restraint standard requiring or permitting compliance "by means of . . . an occupant restraint system other than a belt system"—*e.g.*, compliance by means of an airbag system—except pursuant to a two-house legislative veto procedure and certain other statutory requirements. *Id.* §§ 1410b(b)-(d).[9]

B. The Decision To Require Passive Restraints (1969-1971)

NHTSA's rescission order followed a long and shifting series of regulatory proposals dealing with occupant restraints. Originally, Standard 208 simply required manufacturers to install the "active" safety belts which most manufacturers were voluntarily providing in new cars, and established performance criteria for these systems. 32 Fed. Reg. 2408, 2415 (February 3, 1967). As this requirement has evolved, it affords approximately the same protection in frontal crashes as passive restraints for those motorists who "buckle up" their belt systems,[10] and more protection in nonfrontal collisions than an airbag. R. 402, 447-48, 1259, 2128, 2252-53.[11] Because his-

[9] Where Congress wishes to direct NHTSA to adopt standards dealing with specific aspects of safety, it clearly knows how to do so. *See, e.g.*, 15 U.S.C. § 1392(i), directing NHTSA to adopt standards dealing with eight specific aspects of schoolbus safety.

[10] 41 Fed. Reg. 24070, 24071 (June 14, 1976). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1345 n.53 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979) (upholding the agency's discretion to issue the 1977 passive restraint requirements that were rescinded by the order under review in this case).

[11] References to the joint appendix filed in the court of appeals are cited as "R. ——."

torically too few motorists had buckled up, the agency announced in 1969 that it would propose that manufacturers install "inflatable occupant restraint systems" (*i.e.*, airbags), or other occupant restraint systems that require no action by vehicle occupants. 34 Fed. Reg. 11148 (July 2, 1969). NHTSA soon made clear that airbags would not be the sole means of compliance,[12] and it issued a series of additional notices, rules, and amendments[13] culminating in a mandatory passive restraint requirement under Standard 208. 35 Fed. Reg. 16927 (November 3, 1970); 36 Fed. Reg. 4600 (March 10, 1971); 36 Fed. Reg. 19254 (October 1, 1971).

C. The Elimination of Passive Restraint Requirements (1972-1977) and Their Reinstatement (1977-1981)

Several manufacturers petitioned for review of NHTSA's mandatory passive restraint requirement. In *Chrysler Corp. v. DOT*, 472 F.2d 659, 674 (6th Cir. 1972), the Sixth Circuit held that NHTSA's decision prospectively "to abandon active restraints in favor of passive restraints was a proper exercise of its administrative discretion," and that the "technology-forcing" aspect of the regulation was authorized under the Safety Act. However, the court invalidated as not "objective" the agency's specifications for the test dummies and procedures required to be used for compliance testing, and remanded to provide the agency an opportunity to correct this problem. *Id.* at 675-78. The court ordered that "the effective date for the implementation of passive restraints be delayed until a reasonable time after [new] test specifications are issued." *Id.* at 681. As a result of that decision,

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[12] *See* 35 Fed. Reg. 7187, 7187-88 (May 7, 1970); 35 Fed. Reg. 16927 (November 3, 1970). Hence, by mid-1970, the agency had changed the title of the proceeding from one involving "inflatable occupant restraint systems" to one contemplating "occupant crash protection" by any appropriate means. *Compare* 34 Fed. Reg. at 11148 *with* 35 Fed. Reg. at 7187.

[13] One such series of notices, initiated in 1971, proposed certain emergency release mechanisms for use with passive belts. This series of actions is described below. *See* pages 43-44 *infra*.

the passivity requirement lacked an effective date and a key element on which the performance criteria for passivity turned, *i.e.*, a legally sufficient test device and procedure. The result was an indefinite postponement of passive restraint requirements, although the standard continued to require active belt systems. *Ford Motor Co. v. NHTSA*, 473 F.2d 1241, 1242 (6th Cir. 1973). *See also* 38 Fed. Reg. 16072, 16073 (June 20, 1973); 38 Fed. Reg. 20449, 20450 (August 1, 1973).

In March 1974, NHTSA reproposed passive restraint requirements and new test dummy specifications. 39 Fed. Reg. 10271, 10272 (March 19, 1974).[14] Contrary to the apparent views of the court below, however (*see* App. 9a, 10a, 33a, 34a, 47a, 60a), the agency never adopted that proposal. After a comprehensive review, NHTSA proposed to revoke the incomplete passive restraint provisions of the standard still technically on the books after *Chrysler*, and noted that "[a] decision has not yet been made on the long-term requirements for occupant crash protection." 40 Fed. Reg. 16217 (April 10, 1975). NHTSA thereafter "replace[d]" those passive restraint provisions "suspended as a result of" *Chrysler* by extending the active restraint requirements of Standard 208 through August 31, 1976, and suggested that a further extension was likely. 40 Fed. Reg. 33977 (August 13, 1975).

Secretary of Transportation William T. Coleman, Jr. then personally reviewed the entire passive restraint issue. 41 Fed. Reg. 24070 (June 14, 1976). After further comments and hearings, he issued a 66-page decision (R. 2065) in which he extended the active safety belt requirements indefinitely, continued to permit passive restraints as an option for manufacturers, and deferred any decision to make passive restraints mandatory pending the

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[14] The new dummy specifications proposed for mandatory passive restraints were those previously issued for voluntary passive restraints. *See* 38 Fed. Reg. 20449 (August 1, 1973); 39 Fed. Reg. at 10272. *See also* 42 Fed. Reg. 7148 (February 7, 1977).

results of a large-scale voluntary demonstration program for passive restraints that he negotiated with four manufacturers.[15] Coleman emphasized that his decision "[did] not in any way foreclos[e] a future Secretary or Administrator of NHTSA . . . either to place a termination date on Standard No. 208 or to mandate passive restraints on some or all passenger cars." 42 Fed. Reg. at 5071.

Secretary Brock Adams quickly abrogated the demonstration program and reproposed mandatory passive restraints. 42 Fed. Reg. 15935 (March 24, 1977).[16] Adams endorsed many of the Coleman findings, but concluded that imposing a mandatory passive restraint requirement "is the logical result of those findings." 42 Fed. Reg. 34289, 34291 (July 5, 1977). Contrary to Coleman, Adams believed that "public acceptance or rejection of passive restraints is not one of the statutory criteria which the Department is charged by law to apply in establishing standards." *Id.* Adams set effective dates of September 1981 for large cars (over 114 inch wheelbase), September 1982 for mid-sized cars (over 100 inch wheelbase), and September 1983 for all other cars. *Id.* at 34289.[17] He projected that more than 60% of pas-

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[15] 42 Fed. Reg. 5071 (January 27, 1977). Under the agreements, General Motors, Ford, Volkswagen, and Daimler-Benz agreed to make provisions to sell to the public, at less than the cost of the restraint systems, a total of over 440,000 cars equipped with airbags and 60,000 cars equipped with passive belts. The agreements with GM and Ford included requirements for specific kinds of marketing and promotional efforts. R. 2003.

[16] The requirements proposed and adopted by Adams substantially lessened the requirements upheld in *Chrysler* in recognition of the knowledge gained in the meantime. *Compare* 36 Fed. Reg. 4600, 4604 (March 10, 1971) *and* 35 Fed. Reg. 16927, 16929-30 (November 3, 1970) *with* 42 Fed. Reg. at 15936 *and* 42 Fed. Reg. at 34296-97.

[17] The effective date for large cars was later extended by one year. 46 Fed. Reg. 21172 (April 9, 1981).

sive systems would be airbag systems,[18] and made no finding concerning whether the detachable passive belts also permitted under the rule would actually be used by vehicle occupants.[19] The Adams decision was sustained on review. *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[20]

D. NHTSA's Decision in This Case

In April 1981, Secretary Lewis initiated the action here under review. App. 147a. He noted that NHTSA's decision in 1977 "was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid" (App. 150a)—principally its assumption that at least 60 percent of passive restraint systems installed by manufacturers would be airbag systems. By 1981, the agency found, almost all manufacturers were planning to employ passive belts. *Id.*[21] Secretary Lewis further noted

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[18] App. 95a. This projection was based on the assumption that larger cars would be equipped with airbags and that most smaller cars would be equipped with passive belts. *See* R. 164-65.

[19] The agency's "[n]ominal [p]rojection" of passive belt usage was 60%. 42 Fed. Reg. at 34298 & n.6.

[20] The court found that the statutory criterion of practicability required Adams to consider the public reaction to passive restraint requirements, and that despite his contrary assertion he had properly done so. 593 F.2d at 1345-46 & n.52.

[21] Between 1977 and 1981, consumer demand for large cars had slipped while demand for small cars had grown enormously. App. 151a. As a result of this change in consumer preferences, the expected percentage of cars with passive belts increased substantially. *See* note 18 *supra*. Because of economies of scale, this change would in turn have substantially increased the cost of airbags. *See, e.g.*, App. 151a, R. 170-72. Depending on assumptions about production levels, cost estimates ranged from about $200 to $1200 per car. *Id.* Manufacturers were accordingly electing to comply with Standard 208 by providing passive belts "because of the competitive disadvantage of offering the relatively expensive and inadequately understood airbag when other manufacturers would have been providing automatic belts." App. 96a-97a. Moreover, since airbags would still require use of a lap belt to protect occu-

the accelerated switch from large to small cars "due in large measure to the subsequent oil cutoff of 1979" (App. 151a), and "the unlikelihood of public acceptability" of passive restraints. App. 154a. He therefore proposed three alternative courses of action: (1) reversing the phase-in sequence to require compliance by smaller cars first, (2) requiring simultaneous compliance for all cars, or (3) rescinding the passive restraint requirements.

After further comment and hearing, NHTSA elected the third option. It concluded that its 1977 calculations of the benefits of passive restraints had been "substantially if not wholly undermined by [the] drastic changes" in events identified in its notice of proposed rulemaking. App. 96a. NHTSA had assumed in 1977 that airbags would be installed in most new cars, and it had then further assumed—without any proof or findings—that the passive belts installed in the remaining minority of cars "would be used by 60 to 70 percent of the occupants of those cars." App. 95a. Whether that assumption about usage rates had been correct was now "the most important issue" (App. 94a), because virtually all manufacturers planned to comply by installing detachable passive belts.

After analysis of the available data on usage rates of passive belts that had been installed voluntarily by manufacturers, NHTSA concluded that this data did not support any reliable predictions about increased usage rates of passive belts. App. 95a-104a. It did so primarily for two reasons. First, the existing data involved passive belt systems with coercive features that forced motorists to use them through ignition interlocks or continuous nondetachable belts—systems critically different from those that manufacturers planned to install to comply

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pants in nonfrontal collisions (R. 402, 1259, 2128, 2252-53), manufacturers believed "[i]t would be very difficult to explain to current belt users that they should pay hundreds of dollars more and still have to fasten a lap belt to obtain the safety benefits they now have." R. 402.

with the prospective standard. App. 97a, 102a.[22] Second, the data were limited to users of passive belts provided as optional equipment in certain subcompact cars, for which even *active* belt use is generally substantially higher than the prevailing rate for active belts in all cars.[23]

NHTSA found it could not "reliably predict even a 5 percentage point increase as the minimum level of expected usage increase" with detachable passive belts as the primary form of compliance with the standard:

> "The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." App. 104a.

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[22] As noted above, the 1974 amendments to the Safety Act prohibited any occupant restraint standard that required or permitted compliance by means of interlocks. NHTSA found that most manufacturers planned to use a detachable type of passive belt, *e.g.*, a belt that could be readily detached from its anchorage and that would not provide any restraint until reattached. App. 97a. One manufacturer planned to use on its luxury models a nondetachable belt that could be loosened by unwinding webbing from an automatic spool. R. 304-06.

[23] *See, e.g.*, R. 850. NHTSA found this VW Rabbit and GM Chevette data unreliable for other reasons as well, including the fact that the Chevette and Rabbit owners had "voluntarily" invested in passive restraints and were therefore "more likely to use those restraints than someone who is compelled to buy them." App. 98a. The existence of such a self-selection bias was supported by evidence in the record (*e.g.*, R. 1721) and by the agency's own prior judgment. *See DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 523 (1977) (Administrator Gregory).

This weak prospect as to an increase in usage rates made it impossible for NHTSA to conclude that "the standard is at this time reasonable and practicable" (App. 88a) or that the requirements "would meet all of the applicable criteria in the Vehicle Safety Act" (App. 93a), particularly in light of the substantial costs of passive belts and the need to foster public acceptability. App. 105a, 107a-109a. Accordingly, NHTSA rescinded the requirements. The agency considered and rejected the alternative idea of requiring "use-compelling"—*i.e.*, non-detachable—passive belts. App. 109a-110a. *See* pages 42-45 *infra*.

E. The Decisions of the Court of Appeals

On December 7, 1981, the court of appeals denied the motion for stay filed by respondents here, and set an expedited briefing schedule. App. 86a-87a. The court also instructed all parties "to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates" NHTSA's action. App. 87a.

On June 1, 1982, the court set aside NHTSA's decision to rescind as "arbitrary and capricious" because the court thought NHTSA's "substantial uncertainty" about usage rates with detachable passive belts was a legally insufficient reason for rescission. App. 51a-54a.[24] The majority also held that it was arbitrary to rescind before analyzing "obvious alternatives to rescission" (App. 49a), ranging from continuous or flashing dashboard lights to show when detachable belts were detached, to speed controls, to an airbag-only standard. App. 62a-

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[24] The court attempted to undercut NHTSA's conclusion that the record did not support any reliable findings about expected usage rates. *See, e.g.*, App. 52a n.30. But NHTSA had ample basis to support its doubts on usage rates, as the court acknowledged when it noted that "[t]here may well be 'substantial uncertainty' " about expected usage rates. App. 51a. *See* pages 10-11 *supra*.

68a. The majority also rejected as "hollow" the agency's stated reasons for choosing not to amend Standard 208 at this time to prohibit detachable belts. App. 56a-62a.[25]

The court held that its remand "d[id] not foreclose" agency action suspending or rescinding the passive restraint requirement. App. 72a. *See also* App. 54a. It specifically "decline[d] the suggestions" of respondents here that it order the passive restraint provisions into effect by September 1982 or September 1983. App. 72a.[26] Instead, it required the agency to "recommend to us" (App. 72a) within 30 days "a schedule for resolving the questions raised in this opinion . . . ." App. 74a.

NHTSA thereafter filed a proposed schedule (App. 130a) that the court held "not inconsistent with the Court's order." App. 82a.[27] Nevertheless, it announced on August 4 that "Standard 208 remains fully in force" pending agency rulemaking proceedings, and that manufacturers remained under a duty to comply with the present version of the standard. App. 81a. Notwithstanding its prior refusal to adopt a specific date upon which a standard would become effective, the court "stayed" the effective dates for all new cars until September 1983.[28] It gave NHTSA until October 1, 1982,

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[25] Judge Edwards' concurring opinion "d[id] not accept" the failure to consider alternatives "as a basis for decision in this case." App. 75a.

[26] As noted above, the court had ordered the parties to address lead time issues in their briefs. *See* page 12 *supra*.

[27] The agency proposed to solicit comments on the issue of predicted usage, particularly of detachable passive belts, and proposed guidelines for studies of this issue. It also proposed to solicit suggestions for other regulatory alternatives. Finally, the agency outlined steps it was taking to develop a program for voluntary introduction of airbag options in new car lines, including the possible participation by federal government fleets in this demonstration program. App. 132a-138a.

[28] Actually, the court stayed the effective date of the passive restraint requirements only for large and mid-sized cars, and only

"to advise the Court . . . whether a longer period is required, setting forth adequate reasons therefor." App. 80a.

In its October 1 report, NHTSA submitted that it was not the province of the court to set effective dates under the Safety Act. MVMA Br. App. 44-45. NHTSA also reported that manufacturers could not comply with the effective dates reestablished by the court's order, or practicably with any other date earlier than September 1985. *Id.* at 44 & n.* Respondents here disputed that judgment. *Id.* at 53, 68. Before the court of appeals took any further action, this Court granted the petitions for writ of certiorari, and the court of appeals recalled its mandate *sua sponte*. J.A. 16.[29]

SUMMARY OF ARGUMENT

Despite the long history and technical complexities of the passive restraint portion of Standard 208, the issues on review are simple.

I

The court of appeals did not take issue with any of the three ultimate findings that persuaded NHTSA to exercise its statutory discretion to rescind the passive restraint parts of the standard before their effective dates. But the court ruled that, while the third of these findings would have justified a decision not to issue the standard in the first instance, it was an insufficient basis for rescinding a standard that had already been issued. In so doing, the court of appeals misread the scope of the agency's rulemaking discretion under the Safety Act and

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until a date it had previously rejected. App. 81a. For small cars, the original September 1983 compliance date was not "stayed," but reaffirmed.

[29] On November 19, petitioner Automobile Importers of America, Inc. filed with the court of appeals a motion seeking to clarify the effect of this recall of mandate. The court of appeals denied this motion on December 8, again citing this Court's grant of petitions for writ of certiorari. J.A. 18.

the permissible scope of judicial review under the arbitrary and capricious standard of the APA.

The agency's third finding was that because of changed circumstances since the passive restraint requirement had been adopted in 1977, there was now "substantial uncertainty" whether the requirement would result in a large enough increase in belt usage to justify its billion dollar annual cost. The court of appeals conceded "[t]here may well be 'substantial uncertainty,'" but said this was not the decisive issue. In the court's view "NHTSA turned the question on its head" by asking "whether evidence shows that usage rates will increase by the necessary amount"; instead NHTSA should have asked "whether there is evidence showing they will not." App. 51a.

We submit that it is the court of appeals, not NHTSA, that has turned the question "on its head." The court's assertion that uncertainty cannot be a reason for decision defies both logic and experience. Nowhere is this more true than in regulatory decisions in the field of technology, where predictive judgments must often be made under conditions of uncertainty, and flexibility is especially necessary so that policies may be altered in the light of changing events. By denying these realities, the rule laid down by the court of appeals would produce regulatory paralysis, and saddle the economy with $1 billion of added costs annually despite uncertainty that any benefit will result. While the court acknowledged that substantial uncertainty would justify a decision not to regulate in the first place, it gave no valid reason for its position that the same uncertainty over whether an existing prospective regulation will achieve its objective is an insufficient reason for deregulating. The court's only justification was that substantial uncertainty does not justify changing the regulatory "status quo." App. 51a. This principle of administrative inertia is neither good law nor good practice.

II

The court of appeals improperly sought to justify the extraordinary burden it placed on the agency by reading several legislative events occurring after passage of the Safety Act as a congressional "mandate" to NHTSA to adopt a passive restraint standard. App. 74a.

As the court of appeals conceded, "[N]one of these [legislative] acts carries the weight of positive law, of course." App. 46a. As the court also recognized, the Safety Act does not direct the Secretary to issue particular safety standards for passenger cars; it gives him discretion to issue "appropriate" standards within the parameters laid down by the Act. It is not permissible to interpret subsequent legislative events short of "positive law" as narrowing the agency's discretion under the Safety Act or increasing the scope of judicial review under the arbitrary and capricious standard.

In any event, the court of appeals read these legislative events in a highly selective and speculative fashion. For every event cited by the court to show that some legislators, or even a majority of one or both houses, favored allowing or requiring the agency to adopt a passive restraint standard, there is another event showing that other legislators, sometimes also a majority, favored forbidding the agency to issue such a standard. The fairest reading of all these events is that while Congress from time to time considered requiring or banning a passive restraint standard, it never did so. The farthest Congress actually went was in the 1974 amendment placing limits on the content of any passenger restraint standard the agency might issue. Within those limits, Congress left the agency free to exercise its own expert discretion on whether passive restraints should be required at all, and if so, what the details of that requirement should be.

It is true, of course, that subsequent congressional failure to change the way in which an agency has long con-

strued its statutory authority has in certain cases been interpreted as confirming that construction. But that principle cuts against, not in favor of, the conclusion reached by the court below. In this case, the agency historically has always construed its governing statute as conferring discretion either to issue or not to issue some form of passive restraint standard.

III

There was no factual or legal basis for the majority holding that NHTSA's rescission order was arbitrary and capricious on the additional ground that the agency had failed to consider "obvious" alternatives to rescission. In fact, (1) the agency had proposed not only rescission but also two other alternatives in its April 1981 notice of the proceeding that resulted in the rescission order, (2) the agency's order did consider and reject one of the additional alternatives advanced by the majority (forbidding compliance by means of detachable belts), and (3) the agency had considered and rejected, in earlier phases of Standard 208 and other proceedings, an "airbag only" requirement and virtually all of the other suggested courses mentioned by the majority.

Agencies cannot consider every possible alternative before acting, and this Court has never required them to do so. To the contrary, agencies should be granted leeway to set their own procedural agenda, especially where their actions do not foreclose the future adoption of other possible alternatives. That is true of the rescission action here, and the agency has confirmed its intention to continue its study of how best to increase the usage rates of passenger restraints.

IV

Even if its June 1 judgment and opinion were correct, in its further order of August 4 the court of appeals

usurped the agency's primary jurisdiction to determine, subject to judicial review, whether the effective date of the reinstated passive restraint requirement should be postponed to later dates, fixed now, or stayed until any necessary new dates can be fixed when the agency completes further proceedings following the court's reversal of the rescission order.

ARGUMENT

I. THE BURDEN-SHIFTING RULE ANNOUNCED BY THE COURT OF APPEALS IMPROPERLY RESTRICTS THE DISCRETION OF ADMINISTRATIVE AGENCIES TO MODIFY THEIR POLICIES IN LIGHT OF CHANGING EVENTS.

The fundamental error of the court's unprecedented opinion lies in the five-page section entitled "Modified Standard 208 as Written." App. 50a-54a. In those five pages, the court seriously undermines the discretion of administrative agencies to modify prospective regulatory policies when changes in circumstances create substantial uncertainty whether those policies will actually serve their intended purpose.

The court of appeals upheld as reasonable two of the agency's three key conclusions: (1) that manufacturers intended to comply with the passive restraint requirement primarily by installing detachable passive belts, and (2) that once detached by vehicle occupants, those belts would be functionally equivalent to existing active belts. App. 50a. The court's difficulty arose with the agency's third conclusion: "[t]he rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up." App. 51a.

The court agreed that "[t]here may well be 'substantial uncertainty' about the seatbelt usage rates that can

be predicted if detachable belts are widely used." [30] But it ruled that substantial uncertainty was a legally insufficient basis to justify NHTSA's exercise of its statutory discretion to rescind. The court held that it was the duty of the *agency* somehow to dispel that uncertainty, and that if it did not have the evidence to do so,[31] the rescission order could not stand:

> ". . . [T]he question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. This evidence may take the form of statistical data or logical argument, but it must exist in some form. To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better. There must be *some* reason to support *any* reasoned decision." App. 51a (emphasis in original).

The court's assertion that uncertainty as to the effects of a prospective rule forecloses a decision to rescind that rule breaks sharply with prior precedent. It violates the established principle that the "arbitrary and capricious" standard of the APA "presumes the agency's action to be

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[30] The principal respondents in this Court have acknowledged this uncertainty. Many insurance companies, including respondent State Farm, testified before NHTSA that they refused to provide premium discounts for owners of cars with passive belt systems in advance of substantial on-the-road experience as to the effects of those systems. R. 1241-42, 2550-51. *See also* App. 106a.

[31] The court purported to require either evidence or "logical argument." App. 51a. As shown below, however, it completely ignored NHTSA's logical explanation of its refusal to continue the 1977 regulation in the face of changed circumstances. *See* pages 26-27 *infra*.

valid,"[32] and that that standard places "[t]he burden of overcoming this presumption . . . upon the party challenging the agency action."[33]

The court's rule also defies both logic and experience. Uncertainty is a normal human condition. Nowhere is this more true than regulation in the field of technology, where many regulatory judgments must be made in the absence of conclusive proof. The rule laid down by the court of appeals denies these realities and fosters regulatory paralysis. Just as substantial uncertainty is a sufficient reason for *not regulating* in the first place—as the court below conceded (App. 51a)—so must substantial uncertainty over whether a regulation will achieve its objective be sufficient reason for *deregulating*. This is especially so when, as here, the regulation is still prospective and substantial costs of compliance would otherwise have to be incurred before the regulation takes effect and over the indefinite future thereafter.[34]

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[32] *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976), *citing Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935). *See also Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citing *Pacific States Box*). The court of appeals expressly declined to follow this established rule. *See* App. 31a n.19.

[33] *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 n.28 (D.C. Cir. 1981). In *Telocator Network of America v. FCC*, 691 F.2d 525, 539 n.114 (D.C. Cir. 1982), for example, the court concluded that it would be "manifestly unsound" to hold that "the agency had the responsibility of proving in the first instance that [its proposal] was successful" before those challenging it have any obligation to adduce evidence to the contrary. *See also WBEN, Inc. v. United States*, 396 F.2d 601, 610-14 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (Friendly, J.).

[34] NHTSA found the annual savings in variable manufacturing costs and consumer costs of rescission to be $1 billion; it also estimated the annual savings in fuel costs achieved by preventing a weight-related degradation of fuel economy at $150 million. App. 117a.

The court of appeals offered no rationale or authority supporting its position beyond its assertion that substantial uncertainty does not justify changing the regulatory "status quo." [35] This principle of administrative inertia is neither good law nor good practice. As this Court has long held, "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). This "ability to adapt to new circumstances in a flexible manner" is "[o]ne of the most significant advantages of the administrative process." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 811 (1978). *See also American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967):

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."

Such flexibility is especially appropriate and necessary in the promulgation of rules of general applicability.[36] NHTSA's discretion to set safety standards is a perfect example. The Safety Act requires NHTSA to engage in a difficult balancing of conflicting policies to determine whether a standard is "appropriate" under the Act. *See* page 4 *supra*. Although safety is the "overriding consideration," the Act also requires NHTSA to consider

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[35] The only authority cited in this entire five-page section of the court's opinion was *National Ass'n of Demolition Contractors, Inc. v. Costle*, 565 F.2d 748, 751-52 (D.C. Cir. 1977). *See* App. 53a. This citation is baffling. That case held that it was *not* arbitrary for EPA to have determined that demolition sites were a major source of asbestos emissions *without* engaging in "newly developed tests to measure asbestos emissions." 565 F.2d at 751.

[36] *See generally National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 681-84 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

whether the proposed standard is "reasonable, practicable and appropriate." *H & H Tire Co. v. DOT*, 471 F.2d 350, 356 (7th Cir. 1972) (Stevens, J., concurring). This balancing process is an "inherently legislative . . . task," with "many analogies to a legislative committee hearing." *Automotive Parts & Accessories Association, Inc. v. Boyd*, 407 F.2d 330, 336, 338 (D.C. Cir. 1968). An agency engaged in making such essentially legislative judgments should be permitted to adapt its policy not only to take account of "[c]hanges . . . in objective circumstances," but also to provide for changes "in the way the agency perceives the critical facts." *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-94 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *cert. denied*, 431 U.S. 974 (1977).

Underlying the truism of the court of appeals that there must be "some" reason for "any" decision (App. 51a) is the premise that the reason given for rescinding a regulation—even a prospective one—must be much stronger than the reason for not issuing the regulation in the first place. That premise is contrary to the many decisions upholding agency discretion to modify prior policies in light of changing circumstances. There is no reason to believe that the agency "should be limited to building on the status quo." *General Telephone Co. v. United States*, 449 F.2d 846, 863 n.16 (5th Cir. 1971). *Accord, United States v. Midwest Video Corp.*, 406 U.S. 649, 673-74 n.31 (1972). And there is certainly no reason why continuing the regulatory "status quo" should be presumed more rational than the agency's decision to change a rule when changed circumstances create substantial uncertainty that the rule will accomplish its purpose.[37]

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[37] The court also acknowledged that "the perpetuation of a regulation also involves a decision that its continuation is worthwhile," App. 54a, and it appeared to hold that under the conditions of uncertainty present in this case NHTSA "could reasonably have decided to suspend or amend the regulation," so long as it did not "abando[n] [the regulatory program] altogether." *Id.* NHTSA did

This Court's decision in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), reflects precisely that view. In upholding the FCC's rescission of its policy of regulating radio program formats, the Court noted the agency's conclusion that it "'would have no assurance that [FCC regulation of such formats] would contribute more to listener satisfaction than the result favored by station management.'" *Id.* at 596. It concluded that such "predictions" and the decision whether regulation was appropriate under the circumstances lie "within the institutional competence of the Commission" and are "entitled to substantial judicial deference." *Id.*[38]

The established flexibility of administrative agencies to respond to changing circumstances is particularly necessary in a regulatory scheme, like the Safety Act, in which the agency is called upon to make difficult predictive judgments in advance of any real-world statistical proof.[39] In *American Textile Manufacturers Institute*,

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not "abandon" passive restraints "altogether." It decided to undertake an educational program to increase the buckling up of active belts, and, like Secretary Coleman in 1976, held that "rescission does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize." App. 115a.

[38] This Court's decision in *WNCN* was recently relied upon by a different panel of the court of appeals in *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). In that case, the FCC had concluded that "contrary to its former belief" its policy of regulating multiple ownership in the 50 largest television markets—a policy that had been in effect since 1964—was not fulfilling its objectives. *Id.* at 999. The court of appeals rejected a challenge—virtually identical to the theory devised by the court of appeals in this case—that the agency "did not meet its burden of proving that no harmful effects would flow from repeal of the Policy, but relied instead on a barren record." *Id.* at 1001. The court held that such "an independent study" was not required, and that "[a]n agency need not seek out all available information on the subject before it." *Id.*

[39] As Secretary Adams himself recognized in requiring passive restraints in 1977, "[s]tatistical 'proof' . . . is often not available to

Inc. v. Donovan, 452 U.S. 490, 522-30 (1981), this Court upheld OSHA's cotton dust standard despite the uncertainty recognized by the agency as to the predicted compliance costs:[40]

> ". . . [T]he agency's candor in confessing its own inability to achieve a more precise estimate should not precipitate a judicial review that nonetheless demands what the congressionally delegated 'expert' says it cannot provide." *Id.* at 528 n.52.[41]

The discretion (and indeed the duty) of agencies to change regulations promulgated under conditions of uncertainty about the future is "necessarily the price" of the deference afforded them in plotting the course of regulatory programs.[42] In other words, if agencies are

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resolve public policy decisions." 42 Fed. Reg. at 34292. *See also DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 549 (1977) (NHTSA recognized there existed "only very limited field data to make a judgment call on mandating the passive restraint systems").

[40] Another panel of the court of appeals has similarly observed that "[t]o insist upon concrete proof that a proposed innovation will succeed without undesirable side effects would be effectively to relegate the [agency] to preserving the status quo." *Telocator Network of America v. FCC*, 691 F.2d 525, 542 (D.C. Cir. 1982). *See also Malrite T.V. v. FCC*, 652 F.2d 1140, 1150 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474 n.18 (D.C. Cir. 1974):

> "Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information. Permian Basin Area Rate Cases, 390 U.S. 747, 811 . . . (1968)."

[41] *See also Natural Resources Defense Council, Inc. v. NRC (Vermont Yankee III)*, 685 F.2d 459, 543, 545 (D.C. Cir.) (Wilkey, J., dissenting), *cert. granted sub nom. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 51 U.S.L.W. 3404 (U.S. November 29, 1982) (Nos. 82-524 *et al.*).

[42] *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982). *See also WBEN, Inc. v. United States*, 396 F.2d 601, 614 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968). NHTSA itself

expected to regulate despite their lack of "perfect clairvoyance," those subject to the regulatory scheme cannot object simply because that scheme is later altered to reflect the agency's later recognition of what was not apparent to it earlier. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 673-74 n.31 (1972).

The Sixth Circuit made precisely this point in upholding NHTSA's earlier action in its *Chrysler* decision. The court there recognized that NHTSA's discretion to adopt "technology forcing" passive restraint requirements carried with it the discretion "to extend the time for implementation or to alter, or even to abandon, the project" in the light of subsequent developments. 472 F.2d at 672. The Ninth Circuit reached the same conclusion in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 642 (9th Cir.) *cert. denied*, 439 U.S. 862 (1978) (NHTSA, in promulgating an amended truck brake standard, "had a responsibility to examine the results of its rulemaking" in light of subsequent vehicle experience).[43] Indeed, where basic changes in the regulatory environment have occurred, agencies may be *required* to alter past regulatory policies.[44] But whether

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has recognized its ongoing obligations to review its policies with respect to the occupant restraint program, both in 1976 and 1981. *See* pages 8, 22 n.37 *supra*.

[43] By substantially impairing the ability of administrative agencies to review the effects of their policies in the light of changing events, the court of appeals has thus created significant disincentives to innovative regulation in the first instance. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this Court overturned a D.C. Circuit order reversing an FCC decision not to apply a new concentration of ownership rule to existing combinations. The Court held that if new rules must be applied retroactively, "the [agency's] ability to experiment with new policies would be severely hampered." *Id.* at 811.

[44] *See Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979); *accord, WWHT, Inc. v. FCC*, 656 F.2d 807, 818-19 (D.C. Cir. 1980) (quoted at App. 32a); *cf. Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) (upholding Fifth Amendment challenge to post-war continuation of wartime rent regulations).

or not NHTSA was *required* in this case to rescind its passive restraint requirement in light of the changed circumstances casting substantial uncertainty on its underlying premises,[45] it clearly had discretion to do so.

Of course, where the agency has made a "departure from prior norms," it has a "duty to explain [that] departure";[46] "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."[47] But contrary to the court of appeals' view (App. 47a), NHTSA's action here was not a departure from prior norms. No mandatory passive restraint regulation has ever become effective. The prospective requirement for passive restraints issued in 1970 was never readopted after it was invalidated by the Sixth Circuit in 1972, and was in fact ultimately revoked in 1975. *See* pages 6-8 *supra*. Secretary Adams issued a more limited form of passive restraint regulation in 1977. This 1977 decision rescinding the Coleman demonstration program was specifically upheld as a permissible exercise of the agency's discretion even though it was a departure from the policy of the five preceding years, *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979),[48] because Adams "provided

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[45] NHTSA's determination as to the "primary empirical problem" (App. 50a n.27) of usage rates was so fundamental to its statutory discretion that, had the agency continued the passive restraint requirement despite the changed circumstances reflected by the record, its decision might not have been sustainable on review.

[46] *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

[47] *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring specially), *rev'd on other grounds*, 382 U.S. 46 (1965).

[48] The court of appeals' suggestions about a "consistent administrative interpretation" by NHTSA (App. 47a; *see* App. 30a-31a)

a sufficient explanation why his judgment differed from his predecessor's." The agency justified the reasons for its action more than adequately here. NHTSA explained that its earlier (Adar 3) decision had been based upon predictions about usage rates for passive restraints that were no longer valid, predictions that went to the heart of what the court of appeals recognized as the "primary empirical problem" of belt usage rates. App. 50a n.27.

The court of appeals required far more from NHTSA than a reasoned explanation of its decision to rescind the passive restraint requirement. It required proof by the agency that the detachable passive belts that would have been used to comply with the requirement would *not* increase usage rates by a significant amount. The court did so despite its recognition of the "total absence" of such data, App. 52a n.30: "NHTSA could have conducted surveys or experimented with detachable belt prototypes, or it could have explained logically why usage rates with detachable belts would increase less than 13 percentage points." App. 53a. Such a requirement of "proof" for a prediction of this kind was completely inconsistent with the established discretion of agencies to regulate in conditions of uncertainty—as NHTSA did in 1970 and again in 1977—and their correlative discretion (if not their duty) to modify those existing regulatory policies when new circumstances create substantial uncertainty about the wisdom of continuing them. *See American Textile Manufacturers Institute, Inc. v. Donovan, supra*, 452 U.S. at 522-30. To undermine that discretion is to undermine the vitality and flexibility that have long been recognized to be among the unique advantages of the administrative process.

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simply reflect an inaccurate view of the regulatory history of Standard 208. *See* pages 5-9 *supra*.

II. THE COURT'S UNPRECEDENTED USE OF POST-ENACTMENT LEGISLATIVE EVENTS IMPROPERLY BROADENED THE PERMISSIBLE LIMITS OF REVIEW UNDER THE ARBITRARY AND CAPRICIOUS STANDARD.

Unable to find any precedent for its conclusion that substantial uncertainty is not sufficient ground for rescinding a regulation, the court resorted instead to an extraordinary 25-page exegesis of legislative events which it admitted did not amount to "positive law." App. 46a. It held that this "congressional reaction" (App. 32a) to various versions of Standard 208 "raise[d] doubts" that NHTSA's rescission "necessarily demonstrates an effort to fulfill its statutory mandate" (App. 32a). It ruled that to satisfy these doubts the agency had to provide "increasingly clear and convincing reasons" (App. 48a) for its action. This admittedly "unusual" (App. 32a) expansion of the "arbitrary and capricious" standard infects every aspect of the court's review.[49]

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[49] Though recognizing that the provisions of the Safety Act itself give the agency discretion whether to issue a regulation like Standard 208 (App. 31a), the court variously stated that NHTSA's decisions must be "in accordance with the purposes for which power has been delegated" (App. 4a); that "an agency is not a legislature" (App. 31a); that in this case there are "'danger signals' that the will of Congress is being ignored" (App. 31a); that agencies "have no authority to act inconsistently with their statutory mandate" (App. 32a); that it was required to consider "the extent to which NHTSA's action may be inconsistent with the congressional purpose" (*id.*); that searching review was essential "lest the congressional will be ignored" (App. 46a); that "NHTSA is not writing on a clean slate" (App. 47a); that scrutiny depended upon the extent of "deviat[ion] from congressional expectations" and "the path marked by Congress" (App. 48a); that NHTSA "violates its basic legislative mandate" (App. 49a); that "NHTSA lost sight of its statutory obligation" (App. 56a); that "NHTSA errs when it presumes that it knows how to speak more clearly than Congress" (App. 63a); that "NHTSA may not confuse its

A. The Court Focused Only on Certain Post-Enactment Events To Reach a Totally Unsupported and Highly Speculative Conclusion About the "Will of Congress" That Congress Never Expressed in Positive Law.

The extraordinary standard of review imposed by the court of appeals was based on its interpretation of three instances of "congressional reaction" to various agency proposals for passive restraint requirements during the years following enactment of the Safety Act. Even if it had been employed as a means of statutory interpretation—which it was not [50]—the conclusion drawn by the court from these events would have been completely unfounded.

The 1974 amendments. The first "reaction" was that Congress did not prohibit NHTSA from adopting a mandatory passive restraint standard when it enacted the 1974 amendments to the Safety Act. *See* App. 33a-36a. But this cannot logically be read as a statutory mandate that NHTSA must adopt a passive restraint requirement, especially since in 1974 it was far from clear what passive restraint requirement, if any, NHTSA would adopt. As one of the principal spokesmen for the amendments in the Senate recognized, "[t]he issue of what constitutes the ideal restraint system is far from settled." 120 Cong. Rec. 30839 (1974) (Sen. Eagleton). The primary concern of Congress both in proposing and in adopting the 1974 amendments was not to limit NHTSA's discretion whether or not to adopt a passive restraint standard, but to limit

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role with that of Congress" (App. 71a); and that "agencies may not ignore the mandate they have received from Congress" (App. 74a).

[50] Instead, as we note below, the court saw such legislative events as a way of "formulating" the particular meaning it deemed to be "appropriate" for the arbitrary and capricious standard of review in the APA. App. 26a, 32a. It applied extraordinary scrutiny to that standard in this case "[b]ased on the legislative reaction to the passive restraint standard discussed above." App. 46a.

the scope of any such standard NHTSA might adopt, and —more importantly—to overturn the agency's action permitting compliance with either an active or passive requirement by means of an ignition interlock.[51] A contemporaneous resolution introduced by Senator Magnuson that sought to express "the sense of the Senate" that NHTSA should require passive restraints "as soon as practicable" never even reached the floor. S. Res. 398, 93d Cong., 2d Sess. (1974).

It is true that Congressman Wyman offered an amendment banning mandatory passive restraints which passed the House by a 339-49 margin,[52] but did not find its way into the Senate bill. The failure of the Wyman amendment to become law hardly suggests that either the Senate or the Congress decided to mandate passive restraints. The more plausible hypothesis is that the Senate preferred to leave this open and controversial question to the expert discretion of the agency.[53] This was entirely consistent with the Safety Act policy of not legislating particular safety standards but leaving the subject matter and content of each standard to the agency's informed discretion.

The tabling of 1977 legislative veto resolutions. The court of appeals also divined a legislative "mandate" for passive restraints from the tabling of legislative veto

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[51] *See, e.g.*, 120 Cong. Rec. 11789, 11969, 16326, 18221, 27990-91 (1974).

[52] 120 Cong. Rec. 27822 (1974).

[53] *See, e.g.*, 120 Cong. Rec. 30558 (1974) (Senator Hartke) (urging Senate "not to get into the business of setting standards by statute as the House has done without careful deliberation"); *id.* at 30838 (Senator Buckley) ("Congress should not place itself in the position of writing safety standards with respect to air bags"). Rep. Wyman himself endorsed the conference deletion of his amendment by noting that "[w]e do not know what lies ahead in the field of passive restraints" and that it "has not yet been determined" whether airbags "ought not to be made mandatory equipment." 120 Cong. Rec. 35637 (1974).

resolutions in 1977. But this reading is flatly inconsistent with the veto provision of the 1974 amendments, which specifically provides that it "shall not impair any right which any person may have to obtain judicial review" of Standard 208. 15 U.S.C. § 1410b(e).[54] Congress may elect for any one of a number of reasons not to disapprove an agency regulation. Possible reasons include disinterest, preoccupation with other matters,[55] reluctance or inability to act within the short time limit required by the veto provision, and legislative deference to the agency.[56]

The 1980 reauthorization bill. Although this bill was not enacted, the court of appeals nevertheless attached great significance to the fact that during its consideration "a majority of each house indicated support for the concept of mandatory passive restraints, and a majority of each house supported the unprecedented attempt to require some installation of airbags." App. 46a. This analysis is a perfect illustration of the dangers of dis-

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[54] Of course, these petitioners did not seek judicial review of the 1977 changes in Standard 208. But the purpose of provisions like Section 1410b(e) is to prevent precisely the kind of negative inference arising from failure to disapprove drawn in this case by the court of appeals. *See, e.g.*, 15 U.S.C. § 57a-1(d) (inaction or disapproval on veto resolutions for FTC rules "shall not be construed as an expression of approval" and "shall not be construed to create any presumption of validity").

[55] As one opponent of the rule conceded, "I agree that this particular issue pales in comparison with some of the more weighty matters which must be addressed by this Congress." 123 Cong. Rec. 31010 (1977) (Rep. Kasten).

[56] Chairman Eckhardt specifically noted during the House hearings on the veto resolutions that "If Congress did not overturn this rule, DOT would be under no limitation from retreating from their position, altering it, moving in other directions, et cetera." *Installation of Passive Restraints in Automobiles: Hearings on H.R. 1019 and H. Con. Res. 273 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate & Foreign Commerce*, 95th Cong., 1st Sess. 56 (1977).

cerning statutory "mandates" from floor action on unenacted bills that contain compromises on a wide variety of legislative policy issues.

An overwhelming majority (320 to 73) of the House also "indicated" support for a specific proposal to *ban* mandatory passive restraints when the House approved the Stockman amendment, which would have done just that.[57] The floor debate indicates that the conference report deleting the Stockman amendment and requiring airbags in a few car lines was simply a classic legislative tradeoff (in exchange for a statutory modification of NHTSA's standard for bumper protection) that cannot be read as a congressional mandate for passive restraints.[58] *See* 126 Cong. Rec. H 10197, H 10199 (daily ed. October 1, 1980).[59] Many bitterly opposed the conference bill, and in the end successfully advocated its defeat, because it "totally abandons the House position taken year after year on the airbag." 126 Cong. Rec. H 10198 (daily ed. October 1, 1980).[60]

As is self-evident from the House votes in 1974 and again in 1979 not to require mandatory passive restraints, as well as the other events described above, the asserted congressional "mandate" for passive restraints is con-

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[57] *See* 125 Cong. Rec. H 12285, H 12287 (daily ed. December 19, 1979).

[58] The conferees had reduced from 5 mph to 2.5 mph the speed at which car bumpers would be tested. H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 2, 13 (1980).

[59] Rep. Dingell's position indicates the compromise nature of the report: "While I object to the occupant restraint systems section . . ., I am not urging my colleagues in the House to vote to defeat the report." 126 Cong. Rec. H 10203 (daily ed. October 1, 1980).

[60] In fact, the subsequent Dingell-Broyhill bill—which also garnered a simple majority—was introduced with a statement clarifying that nothing in that proposal or in the Safety Act prevented NHTSA from revoking Standard 208 pursuant to 15 U.S.C. § 1392. 126 Cong. Rec. H 12119 (daily ed. December 5, 1980).

tradicted by other events showing equal congressional hostility to passive restraints. It also ignores that in the end Congress passed no statute altering the agency's discretion under the Safety Act to resolve the issue one way or the other. No significant meaning can be deduced from any of these "congressional reaction[s]," none of which ever was enacted as law.

B. The Court's Improper Use of These Post-Enactment Events Converts the "Arbitrary and Capricious" Test into a Judicial License To Stifle Regulatory Action It Does Not Like and To Usurp the Legislative Discretion Committed to the Agencies.

Reliance on any of the foregoing post-enactment activities would be a highly questionable way of ascertaining the meaning of even the Safety Act itself. As the court of appeals recognized, "[n]one of these acts carries the weight of positive law." App. 46.[61] Indeed, in this case the court ignored the congressional hostility to passive restraints actually registered as "positive law" in the form of 1978 and 1979 amendments to NHTSA appropriation bills.[62]

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[61] Even the legislative history of subsequent *statutes* carries little if any weight in ascertaining the meaning of earlier statutes. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980). Post-enactment oversight activities are even less reliable for that purpose. *See TVA v. Hill*, 437 U.S. 153, 189-91 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *cf. North Haven Bd. of Ed. v. Bell*, 102 S. Ct. 1912, 1923-25 (1982) (failure of veto resolutions may help to "confi[m]" statutory language and legislative history supporting authority to issue regulation, where statutory veto provision provided for veto only upon a congressional finding that regulation was "inconsistent with the Act").

[62] These amendments prohibited use of fiscal year 1979 and 1980 funds to implement a passive restraint requirement. *See* App. 11a, 38a. Although the court correctly observed that these amendments had no practical effect beyond fiscal year 1980, they were enacted as

Of course, subsequent congressional failure to change the way in which an agency has consistently construed its statutory authority may in certain cases be interpreted as confirming the agency's construction. *Haig v. Agee*, 453 U.S. 280, 291-300 (1981); *United States v. Rutherford*, 442 U.S. 544, 554 (1979). But that principle cuts against, not in favor of, the conclusion reached by the court below. In this case, the agency historically has construed its governing statute as conferring discretion either to issue or not to issue some form of passive restraint requirement.[63] The failure of Congress to change that interpretation is far more significant than what Congress did or did not do or come "close" (App. 32a) to doing each time the agency exercised its conceded discretion one way or the other.[64]

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a "first step to send a message" to the agency. 124 Cong. Rec. 17187 (1978). *See also id.* at 17197. And the leading proponents of passive restraints in the House opposed the amendments precisely because they recognized that the amendments were intended "to set a precedent," 125 Cong. Rec. E 4733 (daily ed. September 25, 1979) —a precedent that might well have been followed in fiscal year 1981 had NHTSA itself not concluded that a review of its 1977 rule was appropriate.

[63] As Secretary Coleman noted in his 1976 decision, "In the end, a policy choice must be made between active and passive restraints." R. 2101. *See Motor Vehicle Information and Cost Savings Act Oversight: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 63-68 (1975) (Administrator Gregory). *See also Chrysler Corp. v. DOT, supra*, 472 F.2d at 675.

[64] The cases cited by the court of appeals for the somewhat enigmatic proposition that "an agency is not a legislature" (App. 31a & n.19) make precisely the opposite point, as does this Court's decision in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935). Like Chief Justice Burger's concurrence in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 663 (1980), these cases hold that when an agency is executing delegated legislative authority judicial scrutiny of administrative action must necessarily be narrow.

The error of the court of appeals, however, was much more fundamental than this. The court proceeded to use legislative events and non-events, not as aids to statutory interpretation, but to "formulate" a wholly new standard of "arbitrary and capricious" review under the APA. This unprecedented use of such materials to alter the traditional scope and plain meaning of "arbitrary and capricious" review was nothing short of an exercise in "substitut[ing the court's] judgment" for that of the agency delegated authority to resolve these essentially legislative questions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).[65]

C. The Court Failed To Apply the Narrow, Highly Deferential Scope of Review Which Is Proper in This Case.

As we have already shown, even if one applies to NHTSA's rescission order the scope of review normally applied to an agency decision promulgating a new regulation, the agency order falls well within the scope of permissible agency discretion. But that usual scope of review is itself excessively broad here because it ignores

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[65] The formless nature of this inquiry is well illustrated by the court of appeals' approach in this case. The court asserted that Standard 208 "has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." App. 32a. As noted above, that assertion is simply unsupportable. But how "close" must Congress come in order to trigger greater judicial review under the "arbitrary and capricious" test? The court further warned that NHTSA "cannot suggest that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate." App. 47a. But if they have any bearing at all, how much bearing do they have? The court's opinion suggests no answers to these questions.

the nature of the agency action on review—a rescission of a regulation substantially before its effective date. Under these circumstances, a narrow, highly deferential scope of review is proper.

NHTSA's October 29, 1981 order rescinded the passive restraint requirement twenty-two months before the effective date for small cars and ten months before the effective date for other cars. This is the first case of which we are aware where a court has been called upon to review a rescission of a rule before its effective date. *See* App. 25a. Petitioners submit that the decision here not to let a rule become effective should be treated as analytically equivalent to a decision not to promulgate in the first instance. Such decisions are subject only to a narrow scope of judicial review. *E.g., Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1045-47, 1052-53 (D.C. Cir. 1979); *accord, WWHT, Inc. v. FCC*, 656 F.2d 807, 816-18 (D.C. Cir. 1981). *See also Dunlop v. Bachowski*, 421 U.S. 560 (1975).

The court of appeals rejected the idea that "rescission more resembles agency refusal to act than an agency decision to act" (App. 25a) on the ground that the agency had "rescinded a rule that [was] already . . . promulgated." App. 26a. The court did not consider the crucial fact that the rule had not yet become effective and would not become effective for a substantial period of time. A rescission so far in advance of the effective date is very much like a decision not to promulgate in the first instance.[66] Because it failed to appreciate this point, the court of appeals applied an erroneously stringent scope of review to NHTSA's action.

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[66] *Cf. National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (upholding agency's refusal to adopt proposed standards).

III. THE COURT OF APPEALS IMPROPERLY INVADED THE PRIMARY JURISDICTION OF THE AGENCY TO DETERMINE THE MOST APPROPRIATE PROCEDURES FOR RESOLVING COMPLEX REGULATORY ISSUES.

The majority of the court advanced a second reason for invalidating the rescission order as arbitrary and capricious. They held NHTSA at fault for failing to evaluate a broad range of other regulatory options (ranging from warning lights to speed limiting devices) that in the majority's view should have been considered before making a decision to rescind. App. 54a-68a.[67]

The majority recognized that the agency had "explicitly considered," with an analysis that was "impressively thorough and careful," a "'wide range of possible changes'" to Standard 208. App. 54a-55a. But they held that an even more exhaustive study of regulatory options was necessary before any decision could be made in this particular proceeding. They assumed that the adoption of some form of passive restraint regulation was preferable to—and therefore precluded—rescission: "If NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could." App. 56a. The majority suggested a number of alternatives, strikingly like those which the agency had previously considered in earlier proceedings,[68] but had not

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[67] As noted above, Judge Edwards did not accept the failure to consider these alternatives as a basis for the ruling in this case. App. 75a.

[68] In 1969, the agency initiated the passive restraint rulemaking with a view toward adopting a mandatory airbag standard, but it soon decided to encourage experimentation and innovation in the development of passive restraint systems that could satisfy performance criteria as effectively as airbags. *See* pages 5-6 *supra*. In 1970, the agency proposed a safety standard for speed controls that would have required the horn to operate continuously between 81-85 mph, banned speedometer readings beyond 85 mph, and lim-

proposed or even mentioned in its April 1981 notice, and were therefore not discussed to any significant extent in comments on that notice.[69] The majority insisted that the agency had to reanalyze these options in the course of this proceeding before it could rescind the passive restraint requirement. By doing so, the majority ignored this Court's directive against " 'dictating to the agency the methods, procedures, and time dimensions of the needed inquiry.' " *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-45 (1978).

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ited speeds to 95 mph. 35 Fed. Reg. 18295 (December 1, 1970). Following receipt of extensive comments, the agency "determined that the practicability of [this] system has not been sufficiently established." 39 Fed. Reg. 6765 (February 22, 1974). In 1974, NHTSA dropped a proposal that passive belt systems be nondetachable after the proposal triggered an almost universal negative reaction because of the possibility that nondetachable belts would inhibit passenger egress in emergency situations. *See* page 44 & n. 84 *infra*. In 1974, NHTSA also rejected proposals by Chrysler and others to replace ignition interlocks with warning systems that would have included a warning light that operates continuously until belts are fastened. *See* 39 Fed. Reg. 42692 (December 6, 1974). *See also* 41 Fed. Reg. 54961 (December 16, 1976); 44 Fed. Reg. 77210, 77217 (December 31, 1979); *cf.* 49 C.F.R. § 571.208 (S 4.5.3.3) (1981) (continuous lights required for passive belts). In 1977, the agency entered into agreements with certain automobile manufacturers to equip approximately 500,000 cars with airbags or passive belts as a demonstration project, but abrogated that plan several months later. *See* pages 7-8 *supra*.

[69] There is substantial question whether the agency could have adopted an alternative not proposed in the April 1981 notice. *See* 5 U.S.C. § 553; *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *American Frozen Food Inst. v. Train*, 539 F.2d 107, 135 (D.C. Cir. 1976). *See also Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972) (NHTSA notice proposing amendment of standard regarding turn signal and hazard warning flashers was inadequate where it did not mention the omission of sampling procedures).

A. The Safety Act Permits NHTSA To Rescind Its Passive Restraint Requirements Without First Considering a Variety of Complex "Alternatives" That Were Neither Ripe for Consideration Nor Foreclosed by the Rescission.

Contrary to the majority's suggestion, nothing in the Safety Act suggests that before issuing, amending, or revoking a passenger car standard, the agency must explore every significant alternative regulatory scheme.[70] The majority suggests that Congress would have viewed detachable passive belts as unacceptable (*see* App. 57a-58a, 60a), or would have legislated the "obvious alternative" of an airbags-only standard (*see* App. 63a-64a),[71] or would have preferred a Coleman-type demonstration program (*see* App. 68a). But these hypotheses are wholly speculative, since Congress never legislated on any of these questions. Even if such speculations were

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[70] There is a marked difference between the Safety Act and many other agency enabling statutes. *See, e.g.*, 15 U.S.C. § 2058(c) (requiring CPSC to publish text of proposed rule "including any alternatives" and a preliminary regulatory analysis with a designation of "any reasonable alternatives"); 49 U.S.C. § 1653(f) (prohibiting DOT from using parkland unless there is no "feasible and prudent alternative" to use of such land). In any event, NHTSA's April 1981 notice did propose three alternatives.

[71] The majority simply assumed that "airbags seem to have none of the problems that NHTSA identified in passive seatbelts" and that "the benefits of an airbags-only standard would be significantly greater than the minimal benefits now predicted from Modified Standard 208 as written." App. 64a-65a. Yet even the existing record abounds with references to the difficulties that an airbag-only standard would raise, including questions about the installation of airbags in small cars (R. 2094), the requirement of lap belts to ensure equivalent overall protection in airbag cars (R. 402, 1259), the possible adverse public reaction to mandatory airbags (R. 396, 398, 2123), and their uncertain supply on a wide-scale basis (R. 1475-76). There is also serious question whether an airbags-only standard would violate the Act's requirement of "objective" performance standards, rather than design standards. 15 U.S.C. § 1392(a).

correct, they would be irrelevant to whether the agency's action was beyond its discretion under the Safety Act or "arbitrary and capricious" under 5 U.S.C. § 706 (2) (A).

Agencies performing an essentially legislative function often proceed on a step-by-step basis,[72] and they are generally free to determine when they will address particular regulatory issues.[73] Courts have rarely disturbed agency decisions to pursue an issue or a particular alternative program, at a given time; [74] courts have intervened only when the agency has acted in a manner inconsistent with its statutory mandate.[75] Even where a statute ex-

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[72] *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (legislative ban on plastic nonrefillable milk containers); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935) (legislative restriction on advertising by dentists but not other professional groups).

[73] *E.g., Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1055-56 (D.C. Cir. 1979); *REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *cf. Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (FTC discretion over enforcement decisions).

[74] *See, e.g., Southland Mower Co. v. CPSC*, 619 F.2d 499, 517 n.37 (5th Cir. 1980) (rejecting "claim that the CPSC has a broad obligation to research and develop all possible safety measures" and holding that it "may, within reason, exercise its discretion in allocating agency resources to various projects"). *See also WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) (refusing to disturb agency decision not to initiate rulemaking proceeding); *National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (upholding agency's refusal to adopt proposed standards).

[75] In the few relevant decisions cited by the court to justify its holding (App. 56a, 69a), the applicable statute—unlike the Safety Act—imposed on the agency an explicit or implicit obligation to analyze alternatives to proposed agency action. For example, in *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973), the CAB had failed to recognize that Congress had specifically conferred upon it the power to suspend foreign tariffs and to engage in bilateral negotiations as an alternative to open rates. In *Scenic Hudson Preserva-*

pressly requires the evaluation of alternatives to proposed action, this Court has warned that such a requirement "must be bounded by some notion of feasibility":

> "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vermont Yankee*, *supra*, 435 U.S. at 551.

These principles apply with special force in the context of the Safety Act. From time to time, as NHTSA has gained more knowledge about the predictable effects of various elements of the proposed passive restraint rule, it has modified Standard 208 or postponed its effective date to reflect changed conditions. *See Chrysler*, *supra*, 472 F.2d at 680.[76] On none of these occasions did it consider every possible alternative before modifying the standard or postponing its effective date. The effect of a rule requiring it to do so would create regulatory paralysis.

Nor was it appropriate for the court to characterize its ideas for other regulatory schemes as "alternatives" that must be considered before rescinding the existing rule. The rescission order and the options suggested by the court are in no sense mutually exclusive—as, for example, is true of competing applications for construc-

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tion Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), the FPC was obligated to consider alternatives to a proposed hydroelectric project because the Federal Power Act required that the project be "best adapted" to improving the waterways. In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the agency had "artificially narrowed the scope of the regulatory problem" by failing to ask whether the challenged rules would achieve the statutory objectives. Such an inquiry was precisely what NHTSA undertook in this case.

[76] At the time of the *Chrysler* decision, the passive restraint concept had generated over 20 agency notices, including proposals and final orders. *See* 472 F.2d at 664-67. By the time of the 1981 rescission order, that number had grown to approximately 60. App. 4a.

tion permits,[77] or alternative sites for housing projects.[78] Like Secretary Coleman in 1976, NHTSA specifically noted that its decision here "does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize" after its public education program. App. 115a. Until and unless it does foreclose such options, NHTSA cannot practicably be required to assess their relative merits.[79] NHTSA's decision that the uncertain benefits of the passive restraint requirements "in their present form" do not warrant their continuation now (App. 104a) does not preclude the agency from studying and adopting other regulatory programs thereafter, including those the court majority suggested. Whether or not NHTSA hereafter exercises its discretion to adopt one or more of those "alternative" policies, there was no basis for the court to mandate that the passive restraint requirement be restored in the meantime. Under the Safety Act and the APA, that decision lies within the agency's informed discretion. *See Burlington Northern, Inc. v. United States*, 51 U.S.L.W. 4029 (U.S. December 13, 1982).

B. NHTSA's Reasons for Deciding Not To Prohibit Detachable Belt Systems at the Present Time Were Amply Supported in the Record.

Although it was not obligated to do so, NHTSA expressly considered and rejected one of the options proposed by the court that had not been mentioned in the April 1981 notice—to require compliance with Modified Standard 208 by means other than detachable passive

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[77] *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945).

[78] *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam).

[79] *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 398-402 (1976) (environmental impact statement under NEPA not required before agency actually proposes "major Federal action" affecting the area).

belt systems. App. 109a-110a. The majority found the agency's explanation for this decision "hollow." App. 56a. In so holding, the majority ignored the agency's interpretation of the record and substituted its own regulatory judgment for that of the agency.[80]

The majority concluded that the "decision not to amend the standard so as to allow only continuous passive belts is . . . fundamentally flawed by NHTSA's failure to consider that the standard might only permit use of such belts in the first place." App. 58a. The only support offered for this remarkable proposition is a series of selected remarks by members of Congress, from which the majority concluded that detachable passive belts may not, in fact, be "passive restraints."[81] Yet what Standard 208 may or may not "permit" was not prescribed by Congress, but by the agency. "Passive restraint" is not a statutory term, but a term contained in Standard 208 itself, and NHTSA as the author of the standard is the best judge of what types of restraint systems comply with the words it wrote.[82] And the history of Standard 208 demonstrates a continuing agency commitment to detachability for precisely the reasons of emergency egress and public acceptability identified by NHTSA in this case.

After the issuance of original Standard 208 the agency proposed and then adopted for active safety belts a requirement for a pushbutton release mechanism, not-

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[80] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972).

[81] Once again, the court simply ignored statements of other members of Congress that detachable belts *do* satisfy NHTSA's standard. The 1980 conference report discussed by the court would have required that passive belts "be detach[able] at any point, including one adjacent to the inboard anchor." H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 17 (1980). *See* App. 41a-42a.

[82] An agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

ing that "standardization of release systems is important for safety" [83]—"particularly in emergency situations." 36 Fed. Reg. 4600, 4601, 4605 (March 10, 1971). When the agency first established requirements for an emergency release device for passive belts in 1974, it provided for a similar mechanism. Based on earlier comments,[84] the agency "agree[d] that post-crash egress and avoidance of possible entrapment are important restraint system considerations." 39 Fed. Reg. 3834 (January 30, 1974). After receiving further comments—all but one of which favored such a manual release [85]—NHTSA again mandated such a device, concluding that its advantages "outweigh the disadvantages of possible abuse." And it again required "push-button action for all belt systems so that persons familiar with any belt system in any vehicle can operate the belt system of an unfamiliar vehicle." 39 Fed. Reg. 14593, 14594 (April 25, 1974).

In short, the agency's uniform policy since it first adopted Standard 208 has been to permit detachable push-button belts as a way of ensuring emergency egress.[86] That policy was once again endorsed by tes-

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[83] 35 Fed. Reg. 14941, 14942 (September 25, 1970). *See also* 35 Fed. Reg. 16927, 16931 (November 3, 1970).

[84] The agency's initial proposal for a release mechanism for passive belts would have prohibited "belt separation" and required "that the system be self-restoring after operation of the release." 36 Fed. Reg. 12866 (July 8, 1971). The comments on that proposal emphasized almost unanimously the importance of ensuring ease of emergency egress and the risks of impeded egress if belt separation were prohibited, and they recommended a push-button release mechanism similar to that already required for active belts. *See* R. 2363-64, 2370-79, 2485-96. NHTSA never adopted its 1971 proposal.

[85] 39 Fed. Reg. 14593 (April 25, 1974). *See, e.g.*, R. 2324.

[86] In 1978, NHTSA modified the passive restraint provisions to permit (though not to require) manufacturers of passive belts to develop a release mechanism that would "play out" in an emergency, as opposed to the conventional pushbutton release required since 1974. 43 Fed. Reg. 52493 (November 13, 1978). This amendment was the result of a petition by General Motors to permit the

timony in this proceeding.[87] When it dismissed the agency's judgment not to depart from that well-supported policy in this proceeding as "hollow," the majority substituted its own regulatory judgment on this question for that of the agency. And its dismissal of public hostility to nondetachable belts simply because that hostility might be founded in an "irrational" fear of entrapment (App. 23a, 60a) ignores the agency's duty under the Safety Act to consider the public acceptability of its safety standards. *Pacific Legal Foundation, supra,* 593 F.2d at 1345.[88]

IV. THE COURT IMPERMISSIBLY INVADED THE PRIMARY JURISDICTION OF NHTSA TO SET THE EFFECTIVE DATES OF AMENDED STANDARD 208 PENDING FURTHER AGENCY RULEMAKING PROCEEDINGS.

When it reversed the agency's rescission order on June 1, the court of appeals expressly "decline[d] the suggestions" of respondents here that it order Modified Standard 208 to take effect by September 1982 or September 1983. App. 72a. The court also noted that its

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use of "spool release" belts as an experimental program that "could provide some needed insight into the questions of acceptance by seatbelt *users* of a specific design." R. 2561 (emphasis in original). Based on the almost complete lack of acceptance of that design by the public, GM discontinued such coercive passive belts and planned to install detachable belts instead had the passive restraint requirement been in effect. R. 1433.

[87] The President of the American Seatbelt Council testified, for example, that "practically I realize you have to have detachability for those [*sic*] small group of people that are going to object no matter what," and that "detachability is one of the facts of life we must have in automatic systems in order to get the maximum usage to a major number of people." Tr. of NHTSA Public Hearing, August 5, 1981, at 159-60.

[88] The agency's finding of a widespread fear of entrapment by seatbelts is well supported by the record. R. 1651, 1660-61, 1703, 1978, 2260. Such fears may actually result in physical destruction or elimination of passive belts by motorists. R. 233-34. *See also* Tr. of NHTSA Public Hearing, August 5, 1981, at 160-61.

decision did not foreclose subsequent rescission or suspension of the passive restraint requirements by NHTSA for valid reasons. App. 54a, 72a, 74a. In its August 4 order, however, the court abruptly changed course. It acknowledged that NHTSA's July 1 schedule for further action was "not inconsistent" with its June 1 order (App. 82a), but it nevertheless reinstated the passive restraint requirement, invoking its "equity powers" to extend the effective date to September 1, 1983 for large and mid-sized cars. Although the court requested the agency to advise the court no later than October 1, 1982, whether such a compliance date was "achievable," [89] it made clear that "[t]he reporting date of October 1, 1982, does not affect the requirement that automobile makers comply with the standard by September 1, 1983." App. 81a-82a.

The August 4 order unlawfully invaded the primary jurisdiction of the agency to determine in the first instance whether, when, and in what form passive restraint requirements should be adopted, and what procedures should be used to resolve these issues. The "guiding principle" for judicial review of administrative decisions is that "the function of the reviewing court ends when an error of law is laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). The Court cautioned in *Vermont Yankee*:

> "'At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to

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[89] App. 80a, 81a. The applicable statutory criterion—practicability—calls for a considerably different policy judgment by the agency. *See* 15 U.S.C. §§ 1391(2), 1392(a). As the committee reports explained, this judgment requires "consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); *see also* S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966).

> be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." '" 435 U.S. at 544-45, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).[90]

Here, however, the court of appeals not only dictated the "methods, procedures, and time dimension" of the inquiry by NHTSA. It then proceeded to preempt that entire inquiry by reimposing the effective dates of the standard and, in effect, giving the agency one last shot at convincing the court it was wrong. This Court has held on numerous occasions that courts of appeals must not assume the rulemaking functions delegated to agencies by Congress. *E.g., Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 817-26 (1973); *Burlington Northern, Inc. v. United States*, 51 U.S.L.W. 4029 (U.S. December 13, 1982). Federal courts may neither reinstate regulations that were unlawfully modified[91] nor order other relief that usurps administrative powers.[92] Here, the

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[90] In *Chrysler Corp., supra*, the Sixth Circuit followed these same principles when, after invalidating the compliance procedures of NHTSA's passive restraint requirement, it suspended that requirement "until a reasonable time [to be determined by the agency] after [new] test specifications are issued." 472 F.2d at 681.

[91] *E.g., Consolidated Rail Corp. v. National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981) (summary reversal); *Long Island R.R. v. Aberdeen & Rockfish R.R.*, 439 U.S. 1, 4-6 (1978) (summary reversal).

[92] *See Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1101 (5th Cir. 1976) (order mandating immediate reinstitution of regulations revoked by USDA was a "total displacement . . . of the Secretary's function" not warranted by the district court's equity powers). *See also Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1268-69 & n.7 (D.C. Cir. 1981) (giving effect to rescission of rule pending judicial review of rescission in court of appeals and this Court).

Safety Act expressly reserves to the agency both the discretion to determine effective dates of motor vehicle safety standards,[93] and the authority to review and decide the significance of any new evidence brought to the attention of a reviewing court. 15 U.S.C. § 1394(a)(2).[94] It was improper for the court of appeals to commandeer the complex process of agency fact-finding and rulemaking and to usurp the agency's authority to resolve such issues in the first instance.[95]

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[93] 15 U.S.C. § 1392(c). This discretion was intended to allow the agency to consider economic and engineering factors that may make effectiveness of a new standard within one year undesirable. S. Rep. No. 1301, 89th Cong., 2d Sess. 7 (1966).

[94] This provision is derived from a similar provision of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f)(2). *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 20 (1966). The legislative history of that provision makes clear that, if additional evidence must be taken, the court of appeals may not consider such evidence in the first instance. *Compare* H.R. Rep. No. 2139, 75th Cong., 3d Sess. 10-12 (1938), *with* H.R. Conf. Rep. No. 2716, 75th Cong., 3d Sess. 25 (1938).

[95] The problems that inevitably result when a court of appeals arrogates unto itself the role of administrative expert became painfully clear when the court here ordered the parties to submit additional evidence as to whether the September 1, 1983 effective date it mandated in its August 4 order was "achievable." NHTSA contended that compliance could practicably be achieved by "September 1, 1985 at the earliest." MVMA Br. App. 44. Respondents here opposed this view on the basis of a "leaked" agency staff document purporting to contradict the agency's submission. *Id.* at 68. A supplemental submission by NHTSA showed that there were substantial errors in the staff document, that it conflicted with yet another staff document, and that in any event the analysis in that document was consistent with the agency's conclusions. *Id.* at 115-16.

CONCLUSION

For the reasons stated above, the judgment and orders of the court of appeals should be reversed and NHTSA's order rescinding the prospective passive restraint requirements of Standard 208 should be upheld.

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